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May 13, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 3, 2004

Case No.: TIA-0185

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant

appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a patrolman, inspector, and supervisor at DOE's Savannah River site (the site) for approximately thirty-three years, from 1966 to 1999. The Applicant filed an application with OWA, requesting physician panel review of four illnesses - bursitis, osteoarthritis, fibromyalgia, and colon polyps.

The Physician Panel rendered a negative determination on the claimed illnesses. For the claimed bursitis and osteoarthritis, the Panel stated that the illnesses are caused by "abnormal mechanical stresses and/or trauma to various joints of the body." Panel Report at 3. The Panel stated that the Applicant's records do not indicate evidence of significant work-related trauma that would have caused the illnesses. For the claimed fibromyalgia and colon polyps, the Panel stated that there is no evidence that occupational exposures are a cause of the illnesses.

The OWA accepted the Physician Panel's negative determination. The Applicant filed the instant appeal. The Applicant makes two arguments on appeal. First, the Applicant contends that it is possible that his bursitis and osteoarthritis could have been caused by his work at DOE. He further states that heavy metals could affect the joints. Second, the Applicant argues that the Panel failed to address his hearing loss, precancerous lesion, and the results of his spirometer test.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related

to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's arguments do not present a basis for finding Panel error. First, the Applicant's contention that his osteoarthritis and bursitis could have been caused by his work at DOE is not an indication of Panel error. The Panel stated that the illnesses are caused by abnormal mechanical stresses and/or traumas to the joints. The Applicant's assertion that heavy metals could affect the joints is a mere disagreement with the Panel's medical judgment, rather than an indication of Panel error. Second, the Applicant's argument that the Panel did not address his hearing loss, precancerous lesion, and the results of his spirometer test is not an indication of Panel error. The Applicant did not claim these three conditions in his original application. If the Applicant wishes to pursue these additional illnesses, he should contact DOL on how to proceed.

As the foregoing indicates, the appeal does not present a basis for finding Panel error and, therefore, should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0185 be, and hereby is, denied.
- (2) This denial pertains only to the DOE appeal and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 13, 2005